9

IN THE

Supreme Court of the United States

October Term, 1948
No. 255.

GERHART EISLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Brief of Herbert Biberman, Alvah Bessie, Lester Cole, Edward Dmytryk, Ring Lardner, Jr., John Howard Lawson, Albert Maltz, Samuel Ornitz, Adrian Scott and Dalton Trumbo as Amicus Curiae.

KENNY AND COHN,
By ROBERT W. KENNY,
629 S. Hill Street,
Los Angeles 14, California;

BARTLEY C. CRUM,
San Francisco, California;

MARGOLIS AND McTERNAN,
Successor to GALLAGHER, MARGOLIS, McTERNAN & TYRE,
By BEN MARGOLIS,
Los Angeles, California;

CHARLES J. KATZ,
Los Angeles, California;

WOLF, POPPER, ROSS & WOLF,
By MARTIN POPPER,
New York, N. Y., and
Washington, D. C.;

SAMUEL ROSENWEIN,
New York, N. Y.,

Attorneys for Amicus Curiae.

Printed by Court Journal Printers, Los Angeles Phone MA. 9171.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

MISCELLANEOUS

STATUTES

IN THE

Supreme Court of the United States

October Term, 1948
No. 255.

GERHART EISLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Brief of Herbert Biberman, Alvah Bessie, Lester Cole, Edward Dmytryk, Ring Lardner, Jr., John Howard Lawson, Albert Maltz, Samuel Ornitz, Adrian Scott and Dalton Trumbo as Amicus Curiae.

Statement.

These *amici* are ten motion picture writers, directors and producers, themselves charged with contempt of the House Committee on Un-American Activities arising out of the alleged refusal during the course of the Hollywood Motion Picture Inquiry in October, 1947, to answer questions concerning their trade union and political affiliations. Two of these ten, John Howard Lawson and Dalton Trumbo, have been convicted; their cases are pending on appeal before the United States Court of Appeals

for the District of Columbia. The remaining cases are being held in abeyance in the trial court pending determination of the Lawson and Trumbo cases on appeal.

Before the Committee hearings on Hollywood began, they were functioning artists working in their chosen medium; when the Committee hearings ended, they were blacklisted, broken men, driven from their life's work by this same Committee, all because they dared assert the existence of constitutional guarantees as against the Committee's claim of a limitless power of inquiry.

And equally tragically, those whose jobs in the film world have not yet been directly affected by the conduct of this Committee, carry on their work in fear and uncertainty. The end result of the Committee's Hollywood hearing is this—the motion picture screen is weak and anemic, reflecting only those "pure" ideas, which the Committee considers "safe." Those who challenged the Committee's power were visited by economic death; those who dream of some day challenging that power fear for their economic lives.

Therefore the interest of *amici* in this case; for although the cases of those signing this brief and the instant case are different in many respects, each raising points not involved in the others, there are a number of fundamental questions common to all.

The consent for this filing has been obtained from the parties to this case.

SUMMARY OF ARGUMENT.

Public Law 601 Upon Its Face Is So Vague and Indefinite as to Permit a General Roving Inquisition Into the Affairs, Beliefs, Opinions, and Associations of Private Citizens by the House Committee on Un-American Activities; and, All the Acts, Conduct and Investigations Carried on by Said Committee in Pursuance Thereof Establish Conclusively That Said Law Purports to Authorize Such a General Roving Inquisition Contrary to the First, Fourth, Fifth, Ninth and Tenth Amendments to the Federal Constitution.

The Committee has consistently utilized its powers to impose political censorship upon opinion and expression. No legislative committee may use the coercive powers ordinarily granted to it to pursue such non-legislative purposes. Ours is a government of delegated powers, with the people reserving and exercising the powers of the sovereign under the Ninth and Tenth Amendments. The primary function of the people with relation to government is that of expressing their political views, which includes, of necessity, their associating together for political activity, with a full opportunity to hear and to debate the positions of others, so that the people, as rulers, may decide justly.

What the Committee has done consistently and designedly is not only to step out of the area of power delegated to it, but to step into the domain reserved to the people. If this is allowed to continue, the principle of popular self-government will be no more; government by the people, for the people, of the people, will become only an historical phrase.

And even more tragically, the continued judicial support given to this Committee, through the infliction (and the appellate upholding) of punishment for contempt of citizens hated before it who challenge the limitless power does violence to our basic democratic traditions. It should be halted.

I.

The Committee Has Consistently Utilized Its Powers to Impose Political Censorship Upon Opinion and Expression.

Never before in the history of this republic, have any groups of men claimed and exercised the power to invade the sanctuary of every citizen's mind and, by "exposure," villification and economic reprisals, to destroy those ideas (as well as those men holding them), which do not conform to their test of Americanism. This Committee has functioned in no petty manner. No dictator has ever asserted greater right to control the minds of his subjects.

During its entire existence the Committee has considered its authority under Public Law 601, and preceding resolutions, identical in language, to be sufficiently broad in scope to permit investigation and examination of every kind of organization, whether fraternal, social, political, economic, or otherwise, and of every kind of propaganda including unrestricted inquiry into any and all ideas, opinions and beliefs held or promulgated and the associations of any and all individuals. (House Report 4, 1938, p. 2996.)[1] Hearings Gerald L. K. Smith, 1946, p. 23; Hearings on Communists, 1945, p. 31.

---

[1]Except where otherwise indicated all references to Reports are to reports or hearings of the House Committee on Un-American Activities.

Although the Committee has never been able to agree upon a specific definition of the terms, "un-American propaganda that . . . attack the principle of the form of government as guaranteed by our Constitution," it has conducted its hearings, drawn its findings and conclusions, determined the pertinency of questions and inquiry, summoned witnesses and conducted investigations, upon the assumption and basis that the said terms included the following ideas and beliefs:

1. Political opinions generally considered "new deal" because championed by the late President Roosevelt. On one occasion Chairman Thomas, speaking authoritatively for, and on behalf of, the entire Committee, said that the propaganda being disseminated by agencies of our national Government is "just as un-American as the propaganda that is being spread by those so-called un-American groups." (83 Cong. Rec. 7, p. 7578; Report No. 592, 80th Congress, 1st Session, June 16, 1947, p. 4.)

2. The opinion that the Committee on Un-American Activities is undesirable. (Report No. 592, 80th Congress, 1st Session, June 16, 1947, p. 4; Report No. 592, June 16, 1947, p. 5; Report No. 2233, 79th Congress, 2nd Session, June 7, 1946; Report No. 2233, 79th Congress, 2nd Session, June 7, 1946, p. 31; Report on Citations by Official Federal Government or State or Municipal Agencies or Private Reliable Organizations Regarding the Character of Organizations Named, May 29, 1946, p. 2; Hearings on Gerald L. K. Smith, January 30, 1946, p. 2; House Report No. 1311, 78th Congress, 2nd Session, March 29, 1944, pp. 44, 45.)

3. The opinion that incumbent members of Congress should be defeated and others elected in their place.

(H.-17, p. 10226.) The Committee in one of its reports states that "the essence of totalitarianism is the destruction of the parliamentary or legislative branch of government" and that through "criticizing individual members of Congress" there exists a "widespread movement to discredit the legislative branch of our government." (Report No. 2277, 77th Congress, 2nd Session, June 25, 1942.) Time Magazine was declared to have been engaged in un-American activities because it "gives a two-page spread to the attack made upon Congress by the Union for Democratic Action." (Rep. No. 2277, 77th Congress, 2nd Session, June 25, 1942, p. 4; Rep. No. 2277, 77th Congress, 2nd Session, June 25, 1942, p. 3; Rep. No. 2277, 77th Congress, 2nd Session, June 25, 1942, p. 2.)

4. The following ideas and beliefs concerning economics:

(a) To be in favor of a planned economy;

(b) To oppose monopoly;

(c) To attack "the Standard Oil Company of New Jersey and other responsible industrial organizations";

(d) To "viciously attack cartels";

(e) To say that landlords have highpowered lawyers while tenants do not;

(f) To attack private ownership;

(g) To believe in the abolition of inheritance;

(h) Skepticism as to advertising;

(i) To defend sit-down strikes.

(Rep. No. 1311, March 29, 1944; January 3, 1939, Report, p. 12; Report No. 592, June 16, 1947, p. 9; Report No. 2233, June 7, 1946, p.

35; Report No. 2233, June 7, 1946, p. 35; Report No. 2233, June 7, 1946, p. 11; Hearings on C. P. A., p. 80; Report No. 2277, June 25, 1942, p. 7; January 3, 1939, Report, p. 12; Report on Communist activity in consumer organizations, incorporated in Committee records, December 3, 1939, released to press December 11, 1939. Rep. No. 1311, 78th Congress, 2nd Session, March 29, 1944, Report on P. A. C., p. 82.)

5. The following political opinions:

(a) Opposition to the present system of checks and balances in the Constitution;

(b) Opposition to the method of choosing members of the legislature in New Jersey;

(c) Advocacy of the formation of a national farmer labor party;

(d) Advocacy of the Geyer anti-poll tax bill.

(January 3, 1939, Report, p. 10; January 3, 1939, Report, pp. 38, 39; from testimony set forth in full in the Report because of the Committee's belief in its importance (b) above); January 3, 1939, Report, p. 30; Report No. 592, June 16, 1947, p. 4.)

6. The following opinions on foreign policy:

(a) Advocacy of withdrawal of American troops from China;

(b) Belief in the desirability of the dissolution of the British Empire;

(c) Calling for civilian use of atomic energy and criticizing military use thereof;

(d) Advocacy of the plan advanced by former Secretary of the Treasury Henry Morgenthau, Jr., with respect to our policy in Germany;

(e) The belief that the cause of the Spanish Loyalist Government was just and that the government of Franco Spain is not democratic.

(Report No. 271, 80th Congress, 1st Sess., April 17, 1947, p. 8; Report No. 2283, June 7, 1946, p. 10; Report No. 1996, 79th Congress, 2nd Sess., May 10, 1946, p. 3; Report No. 1996, May 10, 1946, p. 5; Report No. 592, June 16, 1947, p. 10.)

7. Opposition to universal military training. (Report on American Youth for Democracy, No. 271, April 17, 1947, pp. 7, 8.)

8. The following ideas and beliefs with respect to our society:

(a) Absolute racial and social equality;

(b) Opposition to a belief in the divine origin of the rights of man;

(c) Unity regardless of race, creed, and color for a common goal of peace and prosperity.

(Report, January 3, 1939, Un-American, p. 10; January 3, 1939, Report, pp. 10, 11.)

9. Ideas and beliefs favorable to the defense of civil liberties:

(a) Acting as counsel for the Communist Party in civil liberty cases;

(b) Protesting the denial of a meeting place for a speech by Henry A. Wallace;

(c) Protesting the denial of the right of Paul Robeson to speak in Albany and Peoria;

(d) Signing an open letter for Harry Bridges;

(e) Supporting the Scottsboro, and Sacco and Vanzetti cases;

(f) Joining in a resolution signed by such persons as President Woolley of Mount Holyoke, Professor Chafee of Harvard, Professor Fairchild of New York University, Bishop McConnell of the Methodist Church, and Dean Fleming James of the Divinity School of the University of the South, which opposed outlawing the Communist Party.

(Report No. 1311, March 29, 1944, p. 168; Report No. 592, June 16, 1947, p. 5; Report No. 1311, March 29, 1944, p. 143; release of subcommittee of the Un-American Activities Committee dated December 11, 1939, p. 6, incorporated into the Committee's records on December 3, 1949; Rep. No. 592, 80th Congress, 1st Session, Report on Southern Conference for Human Welfare, June 16, 1947, p. 5; Report No. 1115, p. 11; Report No. 1115, p. 9; Report No. 1311, March 29, 1944, pp. 73 ff.; January 3, 1939, Report, pp. 132, 133; Report No. 592, June 16, 1947, p. 4; May 29, 1946, Report, p. 20.)

The promulgation of any and all ideas whatsoever by books or by newspapers or by radio is considered by the Committee to be an activity falling within the scope of its lawful power; it has condemned books and newspapers with which it disagreed, and it has threatened (and de-

stroyed) radio commentators who expressed *verboten* ideas. (Report No. 1311, p. 141; Report No. 592, June 6, 1947, p. 12; Report No. 592, June 16, 1947, p. 5; Report No. 1115, Civil Rights Congress, p. 11, Nov. 17, 1947; Report No. 1115, p. 13, Nov. 17, 1947; Report No. 2277, June 25, 1942, p. 2; Cong. Rec. March 16, 1944, p. 2688; Report of June 7, 1946, "Review of Communist Developments," "Radio Broadcasts"; Report No. 2233, June 7, 1946, pp. 9, 10; Report No. 2233, June 7, 1946, p. 12.)

Out of 207 names sent by the Committee to the Department of Justice as subversive, 7 were included solely because their names were carried in the files of the "Washington Committee for Aid to China," 42 solely because they were listed as members of the "Washington Book Shop," 33 solely because they were at one time members of the "League for Peace and Democracy," and 73 for the sole reason that their names were on a list of the "Washington Committee for Democratic Action." (Cong. Rec. 77th Congress, 2nd Session, February 24, 1942, Appendix p. 724, ff.)

The most recent extension of the Committee's idea of what is "un-American, subversive and Communistic" is that it includes the assertion of the protection guaranteed by the Fifth Amendment to the Constitution of the United States:

> "Among these is the new Communist tactic of evading detection and impeding the processes of legislative investigation through an unwarranted and unjustifi-

able misuse of the protections which the fifth amendment to the Constitution rightfully provides for those unjustly accused or those decent, patriotic Americans who may at times find themselves required to defend themselves in a court of law."—*Interim Report on Hearings regarding Communist Espionage in the United States*, August 28, 1948, p. 15.

All those who have not fully conformed to the Committee's concept of Americanism have been labeled Communists. The Committee has acted upon the assumption that its reason for existence is to destroy all "Communist" influences in America. Thus, during the course of the hearing on "Communist Infiltration into the Motion Picture Industry" conducted in Washington in October, 1947, by the Committee, a member of the Committee urged the Motion Picture Producers Association "to concern itself with cleaning house in its own industry. . . . I don't think you can improve the industry to any greater degree and in any better direction than through the elimination of the writers and the actors to whom definite Communistic leanings can be traced." The Committee's counsel joined in the demand that "Communistic influences . . . and I say Communist influences; I am not saying Communists," be eliminated from the industry by cutting "these people off the payroll." (Hearings Regarding the Communist Infiltration of the Motion Picture Industry, 194, pp. 49-50.)

The number of American people whose right to speak and think has thus been challenged is so large that it can

truly be said that no American, except perhaps the consistently most reactionary, can be sure that what he said yesterday or will say tomorrow will not place him on the Committee's "subversive" list. The Committee has since its inception maintained records and files which now contain over a million names of persons and one thousand names of associations deemed by the Committee to be un-American, subversive or Communistic; these records are growing; the files are made available to Federal and State and other government agencies; names for the records are obtained from various sources, including persons designated as subversive by individuals whom the Committee deemed reliable.

Nor have the Committee's activities been limited to attacks upon individuals because of their ideas. The Committee has assumed for itself the direct authority to censor. Thus, the Committee called upon the motion picture industry to eliminate from pictures anything which the Committee considered Communistic or un-American or subversive propaganda. The Committee chairman and other Congressmen, members of the Committee, recognizing that "it would be very foolish for a Communist or a Communist sympathizer to attempt to write a script advocating the overthrow of the government by force or violence," found un-American propaganda in "innuendoes and double meanings, and things like that" in "slanted lines" in "subversion" inserted in the motion pictures "by a look, by an inflection, by a change in the voice." Among the subversive manifestations in motion pictures specified by the

Committee were reference to some "crooked" members of Congress, to dishonest bankers or senators, to a minister shown as the tool of his richest parishioner, and to presentation of bankers as unsympathetic men. (Hollywood hearings, 44, pp. 15, 17, 50-52, 61, 94, 95, 114, 122-6, 225, 231-2, 234.)

These are not sporadic manifestations of this Committee activity. They are the substance and the sum (as well the end purpose) of this Committee's activity under its construction of the vague language of the Public Law 601.

So drastic an investigational power cannot lightly be presumed to have been lodged in this House Committee by H. R. 5, nor should it be read by implication into that resolution, for to do so raises grave constitutional questions. Despite the willingness of courts to construe liberally the sweep of the Congressional investigatorial power, they have not yet approved so dangerous an extension of that legislative prerogative.

It is no exaggeration to say that judicial support of such power threatens the fabric of our democratic society. And thus far, tragically, this Court has not spoken out definitely with respect to the constitutional bound of this Committee's power. It should do so now.

II.

The Fact That the Committee Has Construed and Exercised the Authority Conferred Upon It as Extending Into What Are Clearly Political and Non-legislative Areas Require a Reversal of the Conviction Herein.

The presumption of regularity of a Congressional investigation is not conclusive; a defendant may show that the Committee has exceeded its powers. Whether it has in fact done so is a judicial question; if the court finds that it has, the court must so declare, and the defendant must be acquitted. This judicial task may be delicate and difficult; but neither delicacy nor difficulty should become effective barriers to the proper exercise of the judicial function.

The nature of the judicial task in determining whether a legislative committee has acted in excess of its power is discussed in *People v. Webb*, 5 N. Y. Supp. 855, 23 N. Y. St. R. 324:

> "Assuming therefore, as we must under the authorities that the legislature has no general judicial powers, and that it can confer none upon its committees, and that its power to punish contumacious witnesses is confined strictly to examination for legislative purposes, *we are forced in this case to the consideration of the question*, was the investigation in which the special committee of the House was engaged, when the relator refused to answer and produce papers, for legislative purposes?

"As we have seen, a legislative committee may summon and examine witnesses in legislative matters; but when they seek to enforce obedience by proceedings for contempt, they must be acting strictly within the limitations of their delegated authority."

In the *Webb* case, the resolution of the investigating committee declared that the investigation was "for the purpose of remedial legislation." To the assertion that this declaration established conclusively the lawlessness of this Committee's purpose, the Court replied (at p. 861):

"* * * But such declaration alone, unsupported by any fact, could not confer jurisdiction. If it could, then, by incorporating such a declaration in a resolution, a legislative committee could invade private rights, and thus inquisitorially proceed to investigate all the transactions of an individual or a community, *under the delusive pretense of remedial legislation* * * *. *The rule is elementary that the mere assertion of jurisdiction does not confer it upon a tribunal of special and limited authority.*" (Emphasis supplied.)

"* * * The courts should and will be quick and firm in halting the exercise of those powers for *irrelevant, illegitimate* or *oppressive* examinations or *purposes.*"—*Hirschfield v. Henley*, 127 N. E. 252.

Burnham v. Morrissey, 14 Gray (Mass. 226), a leading case, held:

"The house of representatives is not the final judge of its own powers and privileges *in cases in which the rights and liberties of the subject are concerned;*

but the legality of its action may be examined and determined by the Court. * * * Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because living under a written constitution no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the power of any branch of government and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void."

See also: *Application of Gilchrist*, 224 N. Y. Supp. 225; *People v. Keeler*, 99 N. Y. 482; *Daugherty's* case, 273 U. S. at 175; *Sinclair v. United States*, 279 U. S. 263; *In re Gunn*, 32 Pac. 470; *State v. Guilbert*, 78 N. E. 931; *Greenfield v. Russell*, 292 Ill. 392; *Stockton v. Leddy*, 55 Colo. 24; and cases collated in American Annotated Cases, 1916-B in the note entitled "General Powers and Privileges of Investigating Committees," at p. 1055. See, also, L. R. A. 1917-F and the cases there collated; *Blakeslee v. Carroll*, 64 Conn. 223, 29 Atl. 473; 25 L. R. A. 106; *In re Oliver*, 92 L. Ed. (Adv. Op. p. 491).

If the principles enunciated in these cases are to be sustained, a judicial determination must be made as to whether the Committee on Un-American Activities has functioned within or outside the limitations imposed upon legislative bodies. It is submitted that the record is clear. This Committee has consistently pursued non-legislative, irrelevant, illigitimate and oppressive purposes. Such usurpation of power should not receive judicial support.

III.

The Committee's Authority and Exercise Thereof Infringes Upon the Area of Governmental Authority Possessed by a Self-Governing People and Reserved to Them by the Ninth and Tenth Amendments.

Under the Constitution, the federal government exercises certain delegated powers only; the remaining governmental powers are reserved to the states and the people. *Ninth and Tenth Amendments to the Constitution of the United States.*

The people hold a two-fold position. They are the sovereign, the source of all delegated governmental powers; at the same time they, as the sovereign, perform essential and separate governmental functions.

Among the governmental functions reserved to and exercised by the people is participation in the myriad forms of action, including political discussion and association, embraced within the electoral and legislative processes. As the Supreme Court said in *Yick Wo v. Hopkins*, 118 U. S. 356, "Sovereignty remains with the people," as the "ultimate tribunal of public judgment," acting either through "the pressure of opinion or by means of suffrage" and exercising the most fundamental governmental functions, because they are "preservative of all rights." Just as the courts interpret and apply the law in judicial proceedings, so the people exercise their governmental powers of voting, of speech, of petition, and of assembly and association, to bring about such changes in the law and its administration as they deem necessary, wise, or just.

Bridge Co. v. U. S., 105 U. S. 470, 482.

As the sovereign, the people reserved to themselves and to the states the powers not delegated to the federal government; the Ninth and Tenth Amendments were adopted to make explicit what was already implicit. So, too, freedom of speech, press, and association, those indispensable corollaries of the powers reserved to the people were spelled out by the Bill of Rights.

Grosjean v. American Trust Co., 297 U. S. 233;
Powe v. U. S. (C. C. A. 5th), 109 F. 2d 147 (cert. den. 309 U. S. 679).

In *United States v. Cruikshank*, 92 U. S. 542, the court said:

"The government thus established and defined is to some extent a government of the States in their political capacity. It is, also, for certain purposes, a government of the people. . . . The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always has been one of the attributes of citizenship under a free government. . . . It was not, therefore, a right granted to the people by the Constitution. The Government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection. . . . The right was not created by the (First) Amendment; neither was its continuance guaranteed, except as against congressional interference . . . the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the National Government is an attribute of national citizenship and, as such, under the protection of and guaranteed by the United States." (See also *U. S. v. Classic*,

313 U. S. 299, 85 L. Ed. 1368; *Ex Parte Yarbrough*, 110 U. S. 651, 28 L. Ed. 274; *In re Quarles*, 158 U. S. 532, 39 L. Ed. 1080.)

"*In a system of popular government the existence of this liberty* (freedom of speech and of press) *is imperative; because, when people frame their constitutions and laws they necessarily reserve to themselves the power to alter or amend them and to change their representatives and officials and even their government at will.* Where individual citizens *participate in the framing of laws and the selection of officials*, they must necessarily be permitted to express their opinion; in order to formulate opinions, *they must know the facts* and circumstances which justify or fail to justify the enactment or repeal of statutes or constitutional provisions, and the merits and demerits of those who aspire to political office . . . *Government by the people is utterly inconsistent with a press not free* and universal suffrage becomes a farce unless speech is free. The conception of *lese majeste* and of the Divine Right of Kings has long since disappeared and we must not make the mistake of substituting therefor a Divine Right of the Majority." Patterson, "Free Speech and a Free Press," pp. 6-7. (Emphasis added.)

"These judges know that statutes, to be sound and effective, must be preceded by abundant printed and oral controversy. *Discussion is merely legislation in the soft. Hence drastic restrictions on speeches and pamphlets are comparable to rigid constitutional limitations on law making.*" Chaffee, pp. 360-361. (Emphasis added.)

A hundred and fifty years ago in a period of history remarkably similar to the present in its fear of ideas and its justification for their suppression, Madison's Vir-

ginia Resolution opposed the American Sedition Act of 1798 because under it Congress would exercise powers which the people did not delegate to it and which were expressly forbidden by the First Amendment. The resolution stated "that such powers more than any other ought to produce universal alarm because it was leveled against that right of freely examining public characters and measures, and all free communication thereof, which has ever been justly deemed the only effectual guardian of every other right." Patterson, in his "Free Speech and Free Press" (p. 134), calls attention to the fact that Madison was chairman of the committee of Congress that drafted the first ten amendments and the preamble to the statute proposing them, and that, therefore, "his argument assumed more than usual importance." See also Patterson's "Free Speech and Free Press," pp. 6-7, 14, 228; Chaffee, "Free Speech in the United States," p. 234, 350-1, 550-63.

The critical balance between limitless power, which is tyranny, and a constitutional democracy can be maintained by constant popular supervision, and then only if the people can exercise their governmental powers without obstruction or interference by the agencies supervised.

The power of Congress to represent the people cannot be used to invade the power of the people over their own representatives. If any one of the branches, exercising delegated powers oversteps its authority, the power of, and opportunity for, correction remain in the people; but

if the power of the people as the sovereign is invaded, democracy disappears.

In the case of *O'Donoghue v. United States*, 289 U. S. 516, holding that the legislature could not reduce judicial salaries because such power would provide the means for its control of the judiciary, the court said:

> "If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution; but in the sense that the *acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments.*" (*Humphries Executors v. United States*, 295 U. S. 602.)

The same principles apply where the federal government interferes in matters reserved to the state governments. *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. Ed. 817. Similarly, it is established that a state may not invade the area delegated to the federal government. In the case of *United States v. Ordett* (D. C. Pa., 1936), 15 Fed. Supp. 736, the state legislature was enjoined when it began an investigation of the functioning of the federal Works Project Administration. The court held that an attempt in any manner to "impede or obstruct" the federal government in the exercise of a federal power is unconstitutional.

It stated that the attempt of the State Committee "to investigate a purely federal agency is an invasion of the sovereign powers of the United States of America," and that such assertion of power "is in contravention of our dual form of government and in derogation of the powers of the federal province." An Australian case to the same effect is *Colonial Sugar Refining Co. v. Attorney General* (1914), A. T. 237.

Although the doctrine of separation of powers has most generally been enunciated in controversies involving delegated branches of government, the principles underlying it are all pervasive and must be applied wherever governmental power is to be found.

The Constitution protects the governmental powers of citizens, including the right of association in a political party; accordingly the legislature may not prescribe political orthodoxy, and may not condemn any political philosophy; just as the judiciary may not interfere in the exercise by the legislature of the powers conferred upon it. Even an attempt to interfere must be stricken down.

> "It would be an abuse of judicial power for the court to *attempt to interfere with the constitutional discretion of the legislature.*" (*Bridge Co. v. U. S.*, 105 U. S. 470, 482.)

The California 1897 Direct Primary Act permitted political parties to require persons, as a condition of voting at the primary, to give an oath that they would thereafter support the nominees of that party. That statute was

declared unconstitutional and the Supreme Court, in *Spier v. Baker* (1898), 120 Cal. 370, said at page 379:

> ". . . And the moment you recognize the existence of power in the legislature to create tests in these primary elections, you recognize the right of the legislature to create any test which to that body may seem proper. While the test prescribed in this act may be said to be a most reasonable one, yet the right to make it carries with it the right to make tests most unreasonable. If the power rests in the legislature to create a test, then the power is found in a Democratic legislature to make the test at a primary election a belief in the free coinage of silver at the ratio of sixteen to one, and the same power is found in a Republican legislature to make the test a belief in the protective tariff. If such a power may be sustained under the constitution, then the life and death of political parties are held in the hollow of the hand by a state legislature."

The case of *United States v. Owlett*, 15 Fed. Supp. 736, recognizes the same principle:

> "The investigation (of WPA by a state committee) is an interference with the proper governmental function of the United States of America. The *complete immunity* of a federal agency from state interference is well established." (Emphasis added.)

The immunity of the federal agency there is no greater than the immunity of the private citizen here, for all citizens have complete immunity in the exercise of their gov-

ernmental functions from any interference by any branch of the government exercising delegated powers.

When exercising governmental functions, the people enjoy an immunity which can be compared to that conferred upon legislators, and for similar reasons. Article I, Section 6, clause 1, of the Constitution states with respect to congressmen: ". . . for any speech or debate in either house, they shall not be questioned in any other place." This protection stems from a deep public interest in encouraging congressmen to participate freely and without limitation in their legislative function. The Constitution protects legislators even against their own misconduct, for fear that otherwise they might fail to conduct themselves with courage on proper occasion. *Kilbourne v. Thompson*, 103 U. S. 168.

Just as the congressmen must select for themselves what they will rely upon in statements made by their fellow congressmen, so the people must select for themselves what they will accept in the marketplace of ideas.

> "But it cannot be the duty, because it is not the right of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." (*Thomas v. Collins*, 323 U. S. 516, 545.)

The people's sovereignty, so long jealously guarded by the courts, now hangs in the balance in this case.

IV.

The Continued Judicial Support of This Committee, Through the Trial Court's Infliction of Punishment for Contempt (and the Repeated Appellate Affirmance Thereof), Does Violence to Our Basic Democratic Traditions.

American democracy is no accident; it is the majestic product of a vigorous, experimental and passionate history. This nation came into existence as the result of a purposeful struggle against governmental tyranny. The heritage of Thomas Jefferson—"Rebellion to Tyrants is obedience to God"—remains with us, embodied in our institutions and traditions. The spirit of Inquisition, which was abjured in the Declaration of Independence, has always been obnoxious to our political and social life. Equally, it has found no tolerance in our legal codes, our legal traditions, our juridical morality. Due process has meant a fair, legal process. Liberty has meant genuine, concrete liberty for the individual citizen—his right to freedom from search and seizure, his right to privacy, his right to be free of persecutory inquisition on grounds of race, color, creed, political opinion or association.

This traditional, tolerant, flexible democracy must not be sapped, calcified or corrupted. A few men, temporarily in the seat of government, have promulgated the validity of inquisitorial procedures into the lives and beliefs of citizens. Armed with their own prejudices, with their own rules of procedure, with the power and dignity of Congress, they tried to become the censors of the nation's thought. That which the sobriety of our law, the majesty of our Constitution, the heart-blood of our tradition, all reject—was practiced with impunity in the stifling atmosphere of a fomented hysteria.

The daily newspapers attest to the resurrection in America of the infamous Star Chambers of England. The House Committee on Un-American Activities sits in judgment upon the conduct and opinions of all citizens, assuming the license to conduct trials by headline, to render verdicts without evidence or cross-examination, to prosecute, vilify and promote the economic blacklist of individuals in its disfavor—and all of this under the guise of an inquiry for the purpose of proposing legislation.

This public infamy is neither capricious nor the accidental by-product of other effort. The conduct of this committee over years reveals a sober, calculated and sinister purpose, namely: to frighten and coerce the citizenry into a new concept of loyalty to the state. The nature of this new, demanded loyalty has been well described:

> "What is the new loyalty? It is, above all, conformity. It is the uncritical and unquestioning acceptance of America as it is—the political institutions, the social relationships, the economic practices." (Prof. Henry Steele Commager, Harper's Magazine, Sept., 1947.)

The bitter price of these inquisitorial activities, if left uncurbed, will be paid by the entire nation. The current victims of this Committee (and of its increasing number of emulators in city, county and state), are only the first, minor casualties of a vaster tragedy to come. The latter has already been envisioned by the Supreme Court:

> "Those who begin coercive elimination of dissent soon find themselves eliminating dissenters. Com-

pulsory unification of opinion achieves only the unification of the graveyard." (*Board of Education v. Barnette*, 319 U. S. 624, 641-642 (1943).)

The impact of these inquisitorial procedures, and of the atmosphere they engender, is already seriously destructive to the national fabric. Tolerance yields before suspicion, mob violence, censorship. In Philadelphia the police raid book-stores without warrant; in New York hitherto acceptable volumes are suddenly removed from school libraries; in a dozen universities learned men are dismissed for holding "wrong" opinions; radio commentators inimical to the House Committee are dropped from networks. These are but a few examples of the plague spots now visible on the body of the community.

Particularly in the fields of ideas, of scientific investigation, of cultural and literary production, our traditional free exchange and free creation are rapidly giving way to suspicion, fear, silence, withdrawal. This situation is attested to by the leading professionals within those fields.

"Atlantic City, N. J., Mar. 19, 1948.

"Five of America's leading scientific societies, meeting here as constituent members of the Federation of American Societies for Experimental Biology, adopted resolutions at membership meetings today 'deploring the actions and procedures' of the Congressional Committee on un-American Activities as 'inimical to the nation's goods . . . The effective use of scientific manpower in Government positions is endangered . . .' (N. Y. Times, March 20, 1948.)

This calamitous impact in the field of science has its counterpart in literature and the arts.

STATEMENT BY 132 MEMBERS OF THE NATIONAL INSTITUTE OF ARTS AND LETTERS, FEB., 1948.

"To the Speaker of the House of Representatives.

Sir:

We, the undersigned, a group of members of the National Institute of Arts and Letters, an honorary organization of American writers, artists and musicians, protest against the methods employed by the Committee on un-American Activities in its examination of certain writers recently summoned before it.

. . . The right of any American to think as he pleases and to say what he thinks is a right of particular importance to us because upon it rests the freedom of the creative artist and, by consequence, the vitality of the creative arts. The methods employed by the Committee on un-American Activities result in an indirect form of censorship. This is proved by the recent action of the motion picture industry in blacklisting the writers who defied the committee. Such censorship, even in the case of those whose political beliefs we vigorously oppose, endangers the very structure of our traditional free art and free literature in the United States." (Author's League Bulletin, March, 1948.)

Sentiments similar to the above have been vigorously expressed by the Authors League of America, by assembled professionals in the arts all over the nation. The concrete result of this intimidation and indirect censorship by the

House Committee has best been expressed by William Wyler, distinguished motion picture director, winner of the 1946 Academy Award for direction of the film, "The Best Years of Our Lives": "I wouldn't be allowed to make 'The Best Years of Our Lives' in Hollywood today." (Radio broadcast, October 26, 1947.)

Conclusion.

The issue is momentous, of far-reaching implication, and the ruling of the Court will be a categorical imperative whose cumulative effect will be seen only in the fullness of time.

> "Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them. Recollection may be refreshed as to the happenings after the first World War by the 'Report Upon the Illegal Practices of the United States Department of Justice,' which aroused the public concern of Chief Justice Hughes (then at the bar) and by the little book entitled 'The Deportations Delirium of Nineteen-Twenty' by Louis F. Post, who spoke with the authoritative knowledge of an Assistant Secretary of Labor." (Frankfurter, J., dissenting, *Harris v. U. S.* (1947), 331 U. S. 145, 173.)

At this truly grave moment in our nation's growth it is in the power of this Court to speak forthrightly in the language of Coke, Camden, and Bradley, in the language of the many illustrious jurists for whom the frenzy of the

political market place never blurred the meaning of freedom.

> "Under our constitutional system courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. * * * No higher duty, nor more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." (*Chambers v. Florida*, 309 U. S. 227, 241 (1940).)

What is required at this moment of this Court is not innovation, but rather a restatement of the glowing principles by which the history of the western world has given dignity to its citizens:

> "Historical liberties and privileges are not to bend from day to day because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price." (Cardozo, J., *Matter of Doyle*, 257 N. Y. 268.)

Only thus can there be a reaffirmance of our great democratic tradition perhaps best epitomized by the concept of Jefferson that in order for democracy to survive "The people must be free to form their own opinions and

to exercise their native reason untrammeled by authority." (Boyd, "Subversive of What?" Atlantic Monthly, August, 1948.)

Respectfully submitted.

KENNY AND COHN,
By ROBERT W. KENNY,

BARTLEY C. CRUM,

MARGOLIS AND MCTERNAN,
Successor to GALLAGHER, MARGOLIS, MCTERNAN & TYRE,
By BEN MARGOLIS,

CHARLES J. KATZ,

WOLF, POPPER, ROSS & WOLF,
By MARTIN POPPER,

SAMUEL ROSENWEIN,

Attorneys for Herbert Biberman, Alvah Bessie, Lester Cole, Edward Dmytryk, Ring Lardner, Jr., John Howard Lawson, Albert Maltz, Samuel Ornitz, Adrian Scott and Dalton Trumbo as Amicus Curiae.